

provide in-region, interLATA services in Illinois is consistent with the public interest, convenience and necessity.” ICC Final Order ¶ 3612.

B. Indiana

On February 2, 2000, Indiana Bell formally requested that the IURC commence a process to review its application to provide long-distance services in Indiana.¹¹ Indiana Bell requested that the IURC review checklist compliance and the performance assurance plan separate from overseeing (and, ultimately, reviewing) the testing of the OSS and performance measures. On March 19, 2001, the IURC issued an order authorizing the OSS test.¹² On September 26, 2002, Indiana Bell made its checklist informational filing. See Butler Aff. ¶ 45 (App. A, Tab 8). On December 11, 2002, parties filed comments and affidavits on Indiana Bell’s September 26, 2002 Checklist Informational Filing. Reply comments and affidavits were filed on January 8, 2003. The IURC gave the parties an opportunity to discuss the checklist filings during workshops held April 2 and 3, 2003. Id. ¶ 46.

Meanwhile, with respect to the Phase II proceeding, Indiana Bell filed a Request that the IURC direct BearingPoint to issue a test report reflecting the status of the OSS test by February 28, 2003. Id. ¶ 47. Indiana Bell also filed a notice that it would supplement the record with the E&Y audit. On February 7, 2003, the IURC issued an Entry directing BearingPoint to issue its

¹¹ Petition of Ameritech Indiana, Petition of Indiana Bell Telephone Company, Incorporated d/b/a SBC Indiana Pursuant to I.C. 8-1-2-61 for a Three Phase Process for Commission Review of Various Submissions of Ameritech Indiana To Show Compliance with Section 271(c) of the Telecommunications Act of 1996, Cause No. 41657 (IURC Feb. 2, 2000) (App. C-IN, Tab 1).

¹² Order, Petition of Indiana Bell Telephone Company, Incorporated d/b/a Ameritech Indiana Pursuant to I.C. 8-1-2-61 for a Three Phase Process for Commission Review of Various Submissions of Ameritech Indiana To Show Compliance with Section 271(c) of The Telecommunications Act of 1996, Cause No. 41657 (IURC Mar. 19, 2001) (App. C-IN, Tab 19).

report by February 28, 2003. Interested parties filed comments on BearingPoint's interim report on April 17, 2003, and Indiana Bell responded on May 1, 2003. Id. ¶ 48. On May 12, 2003, BearingPoint submitted an updated version of the February 28 report. Id. ¶ 50.

On July 2, 2003, the IURC issued a preliminary order in which it identified the need to file the "Compliance Plans" that had been originally developed in Michigan and subsequently filed in Illinois.¹³ Subject to the filing of these final versions of the Compliance Plans, the IURC indicated that it was "prepared to support SBC Indiana's application to the FCC."¹⁴

C. Ohio

Even before the Telecommunications Act was passed in 1996, the PUCO has been actively developing policies promoting local competition. See McKenzie Aff. ¶ 6 (App. A, Tab 32). The PUCO began working on section 271 when it opened a docket in July 1996 to examine Ohio Bell's compliance with the competitive checklist. Id. ¶ 9. In this initial proceeding, interested parties filed a significant number of motions and briefs and participated in direct and cross-examination of witnesses. Moreover, the PUCO established in 1999, pursuant to the SBC-Ameritech merger agreement, an Ohio-specific industry collaborative to investigate the implementation of the Texas OSS and facilities performance measures, as well as the associated standards, benchmarks, and remedies. See McKenzie Aff. ¶ 9.

¹³ Compliance Order, Petition of Indiana Bell Telephone Company, Incorporated d/b/a Ameritech Indiana Pursuant to I.C. 8-1-2-61 for a Three Phase Process for Commission Review of Various Submissions of Ameritech Indiana To Show Compliance with Section 271(c) of the Telecommunications Act of 1996, Cause No. 41657, Attach. 1 (IURC July 2, 2003) ("IURC Compliance Order") (App. C-IN, Tab 71).

¹⁴ Id. at 12.

On June 1, 2000, the PUCO established a phased approach to reviewing Ohio Bell's section 271 application.¹⁵ This included: (1) a regional third-party test of Ohio Bell's OSS and performance measurements; (2) a review of Ohio Bell's compliance with the competitive checklist and of its performance remedy plan; and (3) a review of the final OSS test report and performance results. See McKenzie Aff. ¶ 11.

The PUCO established two additional collaboratives. One was dedicated to developing a master test plan for purposes of governing BearingPoint's third-party test of Ohio Bell's OSS.¹⁶ The second collaborative focused on evaluating the adopted Texas performance measures and evaluating how those measures could be enhanced, modified, and deleted, or how new measures might be added to achieve a set of "best practice" rules that would satisfy Ohio's needs.¹⁷

The PUCO Staff facilitated numerous and lengthy collaborative workshops between Ohio Bell and interested CLECs throughout the section 271 process. See McKenzie Aff. ¶¶ 27-36. These collaboratives addressed such subjects as OSS enhancements, development and supervision of the OSS test (including interfaces, processes and procedures with review and validation of all test results), performance measurements and checklist items (including UNE combinations). Id.

¹⁵ Entry, Further Investigation into Ameritech Ohio's Entry into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996, Case No. 00-942-TP-COI (PUCO June 1, 2000) ("PUCO Initial Order") (App. C-OH, Tab 2).

¹⁶ Entry, Further Investigation into Ameritech Ohio's Entry into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996, Case No. 00-942-TP-COI, at 5 (PUCO Dec. 7, 2000) (App. C-OH, Tab 12).

¹⁷ PUCO Initial Order at 4.

On August 9, 2001, Ohio Bell filed a notice that it intended to seek approval under section 271.¹⁸ See McKenzie Aff. ¶ 13. Ohio Bell filed initial affidavits in support of its claim that it had complied with the competitive checklist and filed additional affidavits in May and July 2002. CLECs filed comments in response to Ohio Bell's initial filing and to the subsequent filings. On November 12, 2002, Ohio Bell filed a supplemental notice of its intent to file its section 271 application¹⁹ and a notice informing the parties that it intended to supplement the record with audit data from E&Y.²⁰ See McKenzie Aff. ¶ 13. Finally, Ohio Bell filed a letter requesting that the PUCO or its Staff direct BearingPoint to issue its test report with respect to all portions of its Ohio OSS test.²¹

On June 26, 2003, the PUCO issued a 252-page report, exhaustively considering and unequivocally endorsing Ohio Bell's showing of compliance with Track A and each of the

¹⁸ See Ameritech Ohio's Notice of Filing Information Concerning Section 271 Checklist Compliance, Further Investigation into Ameritech Ohio's Entry into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996, Case No. 00-942-TP-COI (PUCO filed Aug. 9, 2001) (App. C-OH, Tab 32).

¹⁹ See SBC Ameritech Ohio's Supplemental Notice of Intent To File an Application Pursuant to Section 271 of the Telecommunications Act of 1996, Further Investigation into SBC Ameritech Ohio's Entry into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996, Case No. 00-942-TP-COI (PUCO filed Nov. 12, 2002) (App. C-OH, Tab 95).

²⁰ See SBC Ameritech Ohio's Notice of Intent To File in Phase III Performance Measure Audit Reports, Further Investigation into SBC Ameritech Ohio's Entry into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996, Case No. 00-942-TP-COI (PUCO filed Nov. 12, 2002) (App. C-OH, Tab 96).

²¹ See Letter from Daniel R. McKenzie to Alan Schriber, Chairman, PUCO, Case No. 00-942-TP-COI (PUCO filed Nov. 12, 2002) (App. C-OH, Tab 97).

checklist requirements.²² The PUCO recognized that the evidence in this record demonstrates that “SBC Ohio has opened its local market to competitive local exchange companies (CLECs) who wish to compete in Ohio . . . by fully implementing the competitive checklist found in Section 271(c)(2)(B) with respect to its provision of access and interconnection pursuant to Section 271(c)(1)(A).”²³ The PUCO concluded that, “based on the proceeding [it] conducted, SBC Ohio’s network, for the purpose of satisfying the requirements of the 1996 Act, is open to competitors on a non-discriminatory basis.”²⁴

Although the PUCO strongly recommended approval of Ohio Bell’s application, it recognized that it would be valuable for Ohio Bell to file Ohio-specific “compliance plans” patterned after those that SBC had already filed in Michigan and Illinois.²⁵ Ohio Bell filed the plans on July 3, 2003.²⁶ They included third-party verified plans addressing Customer Service Record Accuracy, Special Services Repair Coding Accuracy and Service Order Completion Timeliness. See McKenzie Aff. ¶ 18. In addition, Ohio Bell submitted the self-reported plans

²² See Report and Evaluation, Investigation into SBC Ohio’s (formerly Ameritech Ohio) Entry into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996, Case No. 00-942-TP-COI (PUCO June 26, 2003) (“PUCO Final Report and Evaluation”) (App. C-OH, Tab 129).

²³ Letter from Alan R. Schriber, Chairman, PUCO, to the FCC Commissioners at 1 (June 26, 2003), attaching the PUCO Final Report and Evaluation.

²⁴ Id.

²⁵ See Order, Investigation into SBC Ohio’s Entry into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996, Case No. 00-942-TP-COI, at 7 (PUCO June 26, 2003) (“PUCO Final Order”) (App. C-OH, Tab 128).

²⁶ See SBC Ohio’s Compliance Plan, Investigation into SBC Ohio’s Entry into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996, Case No. 00-942-TP-COI (PUCO filed July 3, 2003) (App. C-OH, Tab 130).

addressing Billing Auditability, Change Management Communications, Line Loss Notification and Preorder Processing Timeliness. Id. Finally, as directed, Ohio Bell will report to the PUCO on the results of Michigan Bell's compliance plan implementation for directory listings and directory assistance accuracy. Id. The PUCO also ordered Ohio Bell and BearingPoint to complete the OSS test, which Ohio Bell had already committed to do. See id. ¶ 19.

D. Wisconsin

On September 14, 2001, the PSCW issued a notice opening the section 271 docket in Wisconsin.²⁷ Pursuant to this Notice, Wisconsin Bell submitted a draft application for section 271 relief, including affidavits, on March 19, 2002. See VanderSanden Aff. ¶ 14.

On May 3, 2002, the PSCW established a hearing date and filing schedule for comments and reply affidavits from interested parties.²⁸ The parties conducted a technical hearing later that month before the presiding Administrative Law Judge. The Commission revised its filing schedule for reply comments and affidavits from interested parties, see VanderSanden Aff. ¶ 41, and interested parties filed comments and affidavits on July 2, 2002.

Between July and October 2002, the parties participated in a number of collaboratives to resolve some of the outstanding issues. The PSCW solicited further comments and supporting affidavits, and materials were filed by interested parties on November 15, 2002, December 5,

²⁷ Notice of Proceeding and Investigation and Assessment of Costs, Petition of Wisconsin Bell, Inc., for a Section 271 Checklist Proceeding, Docket No. 6720-TI-170 (PSCW Sept. 14, 2001) (App. C-WI, Tab 1).

²⁸ Notice of Proceeding and Investigation and Assessment of Costs and Technical Hearing, Petition of Wisconsin Bell, Inc., for a Section 271 Checklist Proceeding, Docket No. 6720-TI-170 (PSCW May 2, 2002) (App. C-WI, Tab 6).

2002 and December 16, 2002. The PSCW requested proposed findings of fact and conclusions of law in conjunction with the December 2002 filings. Id. ¶ 42.

The parties submitted initial comments, proposed findings of fact, and conclusions of law on December 5, 2002. Reply comments were filed on December 16, 2002. Staff provided the parties with a draft proposed order addressing Phase I issues on January 15, 2003, and the parties were invited to provide comments. Id. In response to the draft proposed order, Wisconsin Bell submitted a Compliance Plan on February 7, 2003. See id. On July 1, 2003, the PSCW issued an order, concluding that Wisconsin Bell had satisfied Track A and the requirements of the competitive checklist, subject to the issues reserved for Phase II.²⁹ On July 7, 2003, the PSCW issued a separate order on Phase II, concluding that Wisconsin Bell provides nondiscriminatory access to its OSS and that it provides UNEs at TELRIC-based rates.³⁰

* * * *

This Joint Application confirms what the state commissions have all expressly found – that SBC has satisfied all prerequisites for interLATA relief. Part I of this Brief details CLECs' provision of local services in the applicant states and explains that, as a result, the BOC applicants are entitled to a "strong presumption" that they comply with the competitive checklist. Part I also details their satisfaction of the first statutory requirement for section 271 relief under

²⁹ Determination, Petition of Wisconsin Bell, Inc., for a Section 271 Checklist Proceeding, Docket No. 6720-TI-170 (PSCW July 1, 2003) (App. C-WI, Tab 66) ("PSCW Phase I Final Order").

³⁰ Determination, Petition of Wisconsin Bell, Inc., for a Section 271 Checklist Proceeding, Docket No. 6720-TI-170 (PSCW July 7, 2003) (App. C-WI, Tab 67) ("PSCW Phase II Final Order").

Track A – the presence of predominantly facilities-based competitors in the local business and residential markets. See 47 U.S.C. § 271(c)(1)(A), (d)(3)(A).

After this empirical proof that local markets are open, Part II demonstrates that the measurements in place to evaluate the BOC applicants' wholesale performance are accurate and reliable. Their data have been verified by a third-party audit, and the measurements themselves were developed through open and collaborative workshops, under the supervision by the state commissions. Moreover, Part II shows that the applicant telephone companies have data controls in place, make raw performance data available to CLECs, and stand ready to engage in data reconciliation.

Part III demonstrates in detail the BOC applicants' compliance with the specific requirements of the competitive checklist, as established by the 1996 Act and amplified by this Commission's implementing decisions. Part III describes the specific terms and conditions of their tariffs and interconnection agreements, as well as technical features of their networks. It demonstrates that the applicant telephone companies' performance in serving CLECs is nondiscriminatory and easily sufficient to provide them with a meaningful opportunity to compete in the local market. This discussion and the affidavits supporting this Joint Application confirm that CLECs in Illinois, Indiana, Ohio, and Wisconsin have access to everything they reasonably might need to compete in those states.

Part IV of this Brief demonstrates that approving this Joint Application would serve the public interest, convenience, and necessity, in satisfaction of 47 U.S.C. § 271(d)(3)(C). Indeed, approval of this Joint Application is not merely consistent with the public interest; freeing SBC from statutory entry barriers is necessary to further local entry and bring consumers in the

applicant states the same benefits of both local and long-distance competition that consumers are now experiencing in other states with section 271 relief.

Part V confirms that SBC will abide by the structural and non-structural safeguards of section 272, as well as the Commission's implementing regulations, when it provides interLATA services in Illinois, Indiana, Ohio, and Wisconsin. See 47 U.S.C. § 271(d)(3)(B).³¹

DISCUSSION

I. SBC HAS SATISFIED THE REQUIREMENTS OF TRACK A IN EACH OF THE FOUR APPLICANT STATES

There can be no serious dispute that the BOC applicants satisfy Track A of the 1996 Act, 47 U.S.C. § 271(c)(1)(A). See Heritage Affs. ¶¶ 4-5 (App. A, Tabs 24-27); see also id., Attach. E.³² The ICC concluded that there are least 12 CLECs that "provide services to residential and business subscribers in the State of Illinois, either exclusively or predominantly over their own facilities." ICC Final Order ¶ 129. The PUCO concluded that Track A had been satisfied, based on evidence that Ohio Bell "had entered into 130 wireline interconnection and resale agreements that were filed and approved by the PUCO" and on the fact that six CLECs "were specifically

³¹ The Anti-Drug Abuse Act certifications required under 47 C.F.R. § 1.2002 are provided in Attachment 2 to this Brief. SBC has, in addition, complied with the FCC's pre-filing consultation requirements through the state commissions' pre-filing proceedings, as described above. SBC has consistently attempted in those proceedings, in its interconnection negotiations and elsewhere, to resolve disputed issues pertaining to the competitive checklist and other relevant matters. This Brief and its supporting affidavits are available in electronic form at http://www.sbc.com/public_affairs/competition_and_long_distance/long_distance_by_state/0,,55,00.html.

³² A list of state commission-approved interconnection agreements is provided as an attachment to the Affidavits of Rhonda J. Johnson for Illinois, Jolynn B. Butler for Indiana, Daniel R. McKenzie for Ohio, and Scott T. VanderSanden for Wisconsin. The status of federal court challenges to these agreements in Illinois, Indiana, Ohio, and Wisconsin is provided in Attachment 3 to this Brief.

identified as offering telephone exchange service to both business and residential customers, either exclusively or predominantly over their own telephone exchange facilities.” PUCO Final Report and Evaluation at 22; see also id. at 23. The PSCW concluded that Wisconsin Bell had satisfied Track A “[b]ecause all the estimates for the number of CLEC access lines put forth by the parties are greater than a de minimis number, the standard the FCC has used in other dockets.” PSCW Phase I Final Order at 21-22.

A. Illinois

According to SBC data, as of May 2003, approximately 75 CLECs provide local service in Illinois Bell’s local service territory, and approximately 55 of those provide service exclusively or predominantly over their own facilities or over unbundled network elements (“UNEs”) leased from Illinois Bell. Heritage IL Aff. ¶ 6 (App. A, Tab 24). Competitors are serving between approximately 2.3 million and 2.4 million access lines throughout Illinois Bell’s local service area, representing between 29 percent and 30 percent of the total lines in the service area. Id. ¶ 4.

Based on SBC’s estimates, CLECs serve at least 34 percent, and potentially closer to 37 percent, of the business market in Illinois Bell’s local service territory and approximately 23 percent of the residential market. Id. ¶ 11. While all measures of competition show rapidly increasing CLEC penetration of the local market in Illinois, competition in the residential market is particularly robust. CLECs already serve somewhere between 982,000 and 1,011,000 residential access lines, the vast bulk of which are facilities-based. See id. ¶¶ 10-12 & Tables 2-3. In its report entitled “Annual Report on Telecommunications Markets in Illinois,” the ICC concluded, on the basis of responses from 45 CLECs, that lines served by competitors in Illinois increased to approximately 1.7 million by December 31, 2002 – a 19.5 percent market share and

an increase of approximately 4 percent compared to the previous year. The ICC also reported that approximately 26 percent of the retail POTS lines served by CLECs in Illinois were provisioned entirely over their own facilities and approximately 59 percent were served in whole or in part by leasing facilities from ILECs or other providers.³³

CLECs are also leasing significant numbers of stand-alone unbundled loops from Illinois Bell, and they are using those facilities to compete in the local market. As of May 2003, Illinois Bell had provisioned approximately 319,000 stand-alone UNE loops to approximately 20 competitors in Illinois. See Heritage IL Aff., Attach. A.

B. Indiana

SBC data confirm that, as of May 2003, approximately 60 CLECs provide local service in Illinois Bell's local service territory, and approximately 30 of those provide service exclusively or predominantly over their own facilities or over UNEs leased from Indiana Bell. Heritage IN Aff. ¶ 6 (App. A, Tab 25). Competitors are serving between approximately 393,000 and 574,000 access lines throughout Indiana Bell's local service area, representing between 15 percent and 21 percent of the total lines in the service area. Id. ¶ 4.

Based on SBC's estimates, CLECs serve at least 19 percent, and potentially closer to 30 percent, of the business market in Indiana Bell's local service territory and between approximately 13 and 14 percent of the residential market. Id. ¶ 11. CLECs already serve somewhere between 203,000 and 224,000 residential access lines, the vast bulk of which are facilities-based. See id. ¶¶ 10-12 & Tables 2-3. In its most recent annual "Telephone Report to

³³ See Heritage IL Aff., Attach. I (Annual Report on Telecommunications Markets in Illinois (ICC May 28, 2003)). The ICC Report reflects statewide data, so it includes data for ILECs and CLECs outside of Illinois Bell's service area. See Heritage IL Aff. ¶ 15.

the Regulatory Flexibility Committee of the General Assembly,” the IURC reported a continued increase in the quantity of lines and market share served by competitors in Indiana. Although the IURC Report necessarily understates the current level of competition in Indiana Bell’s local service territory because it is based on data as of December 31, 2001, and reflects only voluntary survey responses from 40 CLECs, it nevertheless supports the conclusion that Indiana Bell has satisfied Track A.³⁴

CLECs are also leasing significant numbers of stand-alone unbundled loops from Indiana Bell, and they are using those facilities to compete in the local market. As of May 2003, Indiana Bell had provisioned approximately 53,000 stand-alone UNE loops to approximately 10 competitors in Indiana. See Heritage IN Aff., Attach. A.

C. Ohio

As of May 2003, SBC estimates that approximately 55 CLECs provide local service in Ohio Bell’s local service territory, and approximately 40 of those provide service exclusively or predominantly over their own facilities or over UNEs leased from Ohio Bell. Heritage OH Aff. ¶ 6 (App. A, Tab 26). Competitors are serving between approximately 885,000 and 1.4 million access lines throughout Ohio Bell’s local service area, representing between 20 percent and 29 percent of the total lines in the service area. Id. ¶ 4.

Based on SBC’s estimates, CLECs serve at least 23 percent, and potentially closer to 42 percent, of the business market in Ohio Bell’s local service territory and approximately 18 percent of the residential market. Id. ¶ 11. CLECs already serve somewhere between 488,000 and 494,000 residential access lines, the vast bulk of which are facilities-based. See id. ¶¶ 10-12

³⁴ See Heritage IN Aff., Attach. H (Telephone Report to the Regulatory Flexibility Committee of the General Assembly (IURC Oct. 2002)); see also Heritage IN Aff. ¶¶ 14-15.

& Tables 2-3. LECG recently carried out a study that confirms the robust competitive environment that exists in Ohio Bell's local service area. As a condition of the PUCO's approval of the SBC Ameritech merger, the PUCO required that an annual report be performed on the status of local competition from 1999 through at least 2003. LECG delivered the fourth and final annual report, detailing competitive activity for the twelve-month period ending September 30, 2002, to the PUCO staff on March 31, 2003.³⁵

CLECs are also leasing significant numbers of stand-alone unbundled loops from Ohio Bell, and they are using those facilities to compete in the local market. As of May 2003, Ohio Bell had provisioned approximately 125,000 stand-alone UNE loops to approximately 15 competitors in Ohio. See Heritage OH Aff., Attach. A.

D. Wisconsin

SBC estimates that approximately 40 CLECs provide local service in Wisconsin Bell's local service territory, and approximately 25 of those provide service exclusively or predominantly over their own facilities or over UNEs leased from Wisconsin Bell. See Heritage WI Aff. ¶ 6 (App. A, Tab 27). Competitors are serving approximately 633,000 access lines throughout Wisconsin Bell's local service area, representing approximately 25 percent of the total lines in the service area. Id. ¶ 4.

³⁵ See Heritage OH Aff., Attach. H at 16 (Executive Summary of the Year 2002 Competition Report Using the Diagnostic Method for Assessing Competition (PUCO Mar. 31, 2003)) (the data describe "competitive conditions and the overall performance of competitors that is consistent with the ongoing development of a healthy competitive local telecommunications market in SBC Ohio's service area"). According to LECG, CLECs gained over 280,000 access lines in Ohio Bell's service area over the past twelve months, and CLECs are collocated in wire centers that account for over 80 percent of Ohio Bell's residential access lines and nearly 90 percent of Ohio Bell's business access lines. See Heritage OH Aff. ¶ 14.

Based on SBC's estimates, CLECs serve at least 36 percent of the business market in Wisconsin Bell's local service territory and at least 16 percent of the residential market. Id. ¶ 11. CLECs serve at least 231,000 residential access lines, the vast bulk of which are facilities-based. See id. ¶¶ 10-12 & Tables 2-3. In its recently issued report on Local Telecommunications Competition in Wisconsin, the PSCW Staff concluded that as of June 30, 2002, competitors served almost 445,000 voice grade lines in Wisconsin Bell's local service area, reflecting a market share of 18.7 percent – up from 14.6 percent since the end of 2001.³⁶

CLECs are also leasing significant numbers of stand-alone unbundled loops from Wisconsin Bell, and they are using those facilities to compete in the local market. As of May 2003, Wisconsin Bell had provisioned approximately 229,000 stand-alone UNE loops to approximately 10 competitors in Wisconsin. See Heritage WI Aff., Attach. A.

II. SBC HAS ADOPTED COMPREHENSIVE AND RELIABLE STATE-APPROVED PERFORMANCE MEASUREMENTS

This Brief and the accompanying affidavits set out in detail the BOC applicants' compliance with the section 271 competitive checklist in their respective states. Much of that showing relies on performance data that compare the BOC applicants' wholesale provisioning of services and facilities for CLECs to the BOCs treatment of their own retail services or against state commission-approved benchmarks. Before turning to the specific checklist items, the BOC applicants will demonstrate that these performance measures are comprehensive and that the

³⁶ See Heritage WI Aff., Attach. G, at 1 (Report on Local Telecommunications Competition in Wisconsin as of December 31, 2001 and June 30, 2002 (PSCW June 11, 2003)) (noting that "[t]he most striking trend in local telecommunications is the decline in the number of lines and the accompanying basic local service revenues for the ILECs in Wisconsin"); see also Heritage WI Aff. ¶ 14.

reliability of the data collection has been validated by third-party audits and continues to be validated on an ongoing basis by their state commissions.

This Commission has made clear that the reliability of a Bell company's performance measurement data depends on a variety of factors, including the extensiveness of a third-party audit, the "open and collaborative nature of metric workshops," the supervision by the applicable state commission, the applicant's "readiness to engage in data reconciliations" between its own records and those of the CLECs, and the applicant's internal and external data controls. See Georgia/Louisiana Order ¶¶ 18-19. The BOC applicants have satisfied each of these factors.

A. Third-Party Audit

The performance-measurement system throughout SBC's Midwest region has been comprehensively reviewed and verified by E&Y. See Ehr/Fioretti Joint Aff. ¶¶ 18-31 (App. A, Tab 22). E&Y's audit of the BOC applicants' performance measures is now entirely complete. See id. ¶ 22 & Attach. A. E&Y's review of the performance data was substantially more comprehensive than the audit it conducted on behalf of the Missouri Public Service Commission in 2000 as part of that commission's review of Southwestern Bell's section 271 application in Missouri. Id. ¶ 19.³⁷ It is clear, therefore, that, standing alone, the E&Y audit should be more than adequate to satisfy this Commission's interest in having a third-party test of the BOC applicants' performance-measurement processes and results. Any other conclusion would impose a requirement on SBC that this Commission has never imposed before.

³⁷ See also Ex Parte Letter from Geoffrey M. Klineberg, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., to Marlene H. Dortch, FCC, WC Docket No. 03-16, Attach. A at 2 (Mar. 28, 2003) ("SBC's March 28 Ex Parte") (App. M, Tab 150).

The question, then, is whether it makes any difference to the reliability of SBC's reported performance-measurement results that BearingPoint is continuing to perform its review of the same performance-measurement system that E&Y has already found to be accurate and reliable. The answer is simple. It should not make any difference, unless BearingPoint is uncovering a substantial number of material problems with the way SBC is calculating or reporting significant performance-measurement results that E&Y somehow overlooked or missed in its own review of those same measures. It is not sufficient that BearingPoint raises a question about a particular measurement or reported result. If the E&Y audit is sufficient, standing alone, to justify reliance on SBC's reported performance-measurement results, then BearingPoint's issuance of an "observation" or "exception" concerning a particular measurement during its on-going and incomplete review cannot overcome an E&Y finding that the result is calculated or reported correctly. BearingPoint issues "observations" and "exceptions" as a means of informing both SBC and the state commissions of issues that may need to be addressed; SBC's response is typically to provide further clarification, to make limited computer program code modifications, to modify its documentation, or to work with BearingPoint to arrive at a common understanding of the issues. See Ehr/Fioretti Joint Aff. ¶¶ 39-42; id. ¶ 41 ("There are many examples of observations and exceptions that BearingPoint has issued which have subsequently been closed simply because SBC Midwest provided a satisfactory explanation to BearingPoint.").³⁸

³⁸ In its most recent evaluation of SBC's section 271 application for Michigan, the Department of Justice suggested that SBC had "confuse[d] the burden of making a prima facie case with the ultimate burden of persuasion. One could find the E&Y review and conclusions sufficient to make a prima facie case that SBC's metrics are reliable and still conclude, considering the totality of evidence in the record, that certain metrics are not reliable." Evaluation of the United States Department of Justice at 13 n.62, WC Docket No. 03-138 (FCC filed July 16, 2003) (available at <<http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm>>). SBC is not confused. Having now established its prima facie case that its performance

This process does not render the findings of E&Y suspect, especially when BearingPoint has not yet completed its performance-measurement review. It simply reveals a difference in the methodologies and approaches used by E&Y and BearingPoint in reviewing SBC's performance-measurement and reporting system. In any case, BearingPoint is making progress in completing its review. For example, the June 30, 2003 Ohio Report now shows that of the 270 applicable test points, 152 (or 56.3 percent) test points have been "Satisfied," 63 (or 23.3 percent) are considered "Not Satisfied," and 55 (20.3 percent) are "Indeterminate." See Ehr/Fioretti Joint Aff. ¶¶ 52-53 & Table.

There is a high correlation in results reached by E&Y and BearingPoint, notwithstanding significant differences in their methodologies and approaches. There are two principal reasons for any differences between the results: (1) Because BearingPoint tests the performance data for a particular set of months, the more recent corrective action that SBC made in response to E&Y findings was often not reflected in the older data that BearingPoint reviewed. Thus, in some instances, BearingPoint is identifying a problem with a performance measure that is no longer a problem, because E&Y had already identified the same problem and SBC took action to correct it. (2) Because BearingPoint applies a one percent materiality standard while E&Y employs a 5 percent materiality standard, a "problem" identified by BearingPoint might not have registered as a problem for E&Y, because it simply was not deemed to be a material issue. See Ehr/Fioretti Joint Aff. ¶ 96; SBC's March 28 Ex Parte, Attach. A at 9-10.

measurements are accurate and reliable, the burden shifts to those who would challenge this conclusion to provide some evidence "that certain metrics are not reliable." SBC's only point is that the mere fact that BearingPoint has not yet completed its PMR test is not, itself, evidence of anything at all.

Nothing that BearingPoint has found so far calls into question the conclusions of E&Y that SBC Midwest's performance measurements are accurate and reliable. Specifically, SBC is providing a series of charts that focus on the snapshots reflected in BearingPoint's May 12, 2003, Draft Report in Indiana, the June 2, 2003, Draft Report in Illinois, and the June 30, 2003, Draft Reports in Ohio and Wisconsin³⁹ with respect to the critical performance measurements on which this Commission has historically relied in prior section 271 applications. SBC has demonstrated that the issues that BearingPoint has identified do not undermine E&Y's conclusions. See Ehr/Fioretti Joint Aff. ¶¶ 94-163 & Attachs. B-F.

1. Metrics Data Integrity Test (PMR4)

In the Metrics Data Integrity Test (PMR4), BearingPoint evaluates the policies and practices used by SBC Midwest, including each of the BOC applicants, for processing the data used in the production of the reported performance results. See Ehr/Fioretti Joint Aff. ¶ 98. This test is still ongoing. In the June 30, 2003 Ohio and Wisconsin Report, BearingPoint reported that of the 40 PMR4 test points, 11 are "Satisfied," 26 test points are "Indeterminate," and 3 are "Not Satisfied." SBC Midwest and BearingPoint have developed a detailed project plan that identifies each of the activities required to complete the PMR 4 evaluation, along with specific tasks and target dates. The parties expect to complete PMR4 by the end of August 2003, based on a "zero defects" assumption. See id. ¶ 99. As of July 1, 2003, BearingPoint has issued 12 exceptions relating to data integrity (PMR4). Nine exceptions have now been closed as "Satisfied," one (E-175) has been closed as "Not Satisfied," and SBC Midwest has provided BearingPoint with complete responses regarding the other two which are "Open." These two – Exceptions 181 (IL,

³⁹ BearingPoint's OSS Evaluation Project Report Metrics Update (Apr. 30, 2003), attached to Michigan 271 Application, WC Docket No. 03-138 (Supp. App. C, Tab 14).

IN, and OH) and 182 (WI) – both apply to the same issue (PM 104.1) and account for the three PMR4 test points that are evaluated as “Not Satisfied” in the June 30, 2003 Ohio and Wisconsin Reports. Id. ¶¶ 100-101.

Nearly all of the issues related to the three PMR-4 test points now scored “Not Satisfied (In Retest)” duplicate an issue that E&Y had also identified as requiring corrective action. Id. ¶ 102. SBC Midwest has since corrected the issue, and E&Y has validated that the correction was appropriate. The reason why BearingPoint continues to identify these issues as problematic in its June 30, 2003 Ohio Report is simple: BearingPoint is continuing to test data from months that predate the month in which SBC Midwest implemented corrective actions to address the issues identified by E&Y. Id. These remaining PMR4 test criteria would have been found to be satisfactory had BearingPoint evaluated performance data reflecting the corrective actions; indeed, BearingPoint is now conducting its retest activities on more recent data months. Id.

In sum, none of the BearingPoint “Open” exceptions or “Not Satisfied” test findings in the four reports in any way compromises the results of the E&Y audit. Id. ¶ 103. Moreover, none of these issues identified by BearingPoint has any impact on the March, April, or May 2003 reported performance results on which the BOC Applicants rely in this Joint Application. Id. ¶¶ 104-113.

2. Metrics Calculations and Reporting (PMR5)

In the Metrics Calculations and Reporting Test (PMR5), BearingPoint evaluates the processes used by SBC Midwest to calculate performance results, and it also assesses whether the BOC applicants have appropriately calculated those results in light of their approved business rules for each reported measure. See Ehr/Fioretti Joint Aff. ¶ 114. The PMR5 test is still underway. In Ohio and Wisconsin, as of June 30, 2003, BearingPoint has determined that 24 (in

both states) of the 72 applicable test criteria have been “Satisfied,” 11 (in Wisconsin) and 17 (in Ohio) are “Indeterminate,” and 37 (in Wisconsin) and 31 (in Ohio) are “Not Satisfied.” See id. ¶ 118 (Table).

Within PMR5, there are four test criteria: PMR5-1 tests whether performance measure disaggregations are reported in a manner that is consistent with the business rules; PMR5-2 tests whether BearingPoint can independently replicate the reported performance results by using calculation programs that BearingPoint developed to recalculate the BOC’s unfiltered, unprocessed data; PMR5-3 tests whether the BOC is calculating results consistent with the business rules; and PMR5-4 tests whether the BOC is excluding data consistent with the business rules. See id. ¶ 115.

PMR5-1 has been completely satisfied. See id. ¶ 121. The open observations and exceptions therefore fall into one of the three remaining test criteria.

PMR5-2 involves a process called “blind replication.” Focusing on the performance measurements that the Commission has historically identified as critical for evaluating whether the local market is open to competition, SBC has analyzed BearingPoint’s exceptions and observations under PMR5-2.

BearingPoint has been able to replicate or “match” between 88.6 percent and 97.0 percent⁴⁰ of the key measures evaluated to date for July through September 2002 based on a 1 percent deviation standard.⁴¹ The four-state “match” rate is 94.0 percent. See Ehr/Fioretti Joint

⁴⁰ Illinois Bell (94.9%), Indiana Bell (97.0%), Ohio Bell (95.7%), and Wisconsin Bell (88.6%). See Ehr/Fioretti Joint Aff. ¶ 139.

⁴¹ A non-match is “material” if the difference between the reported and calculated results was five percent or greater or if the difference would have caused a change in the originally reported performance result on the Hit or Miss Report – i.e., whether it would have changed a

Aff. ¶ 139. Of the remaining sub-measures, an additional 1.1 percent to 2.6 percent of the sub-measures matched based on a 5 percent materiality threshold (i.e. “non-material matches”), accounting for a total match rate of between 91.2 percent and 98.3 percent⁴² of the sub-measures evaluated during this time period. On a four-state basis, there were an additional 1.6 percent of the sub-measures that matched using the 5 percent materiality standard, for a total match of 95.6 percent. Id. The remaining 1.7 percent to 8.8 percent “non-matches” have no material affect on the March through May 2003 performance data on which the BOC Applicants have relied in this Joint Application. Id. & Attach. E.

Because E&Y did not include blind replication as part of its audit of the BOC applicants’ performance measurements, there is no way to compare BearingPoint’s current results on PMR5-2 with E&Y’s findings. Nevertheless, SBC has analyzed the current status of BearingPoint’s blind replication test and, with respect to the critical performance measurements, has explained every occasion where BearingPoint has been unable to replicate SBC’s reported results. See id. ¶¶ 140-143 & Attach. E. BearingPoint’s replication effort will continue for months to come, but the critical point is that nothing BearingPoint is currently finding calls into question E&Y’s conclusion that these performance measurements are accurate and reliable.

BearingPoint’s testing under PMR5-3 (business rule calculations) and PMR5-4 (business rule exclusions) verifies that SBC Midwest’s reported results are consistent with its documentation and stated objectives. See id. ¶ 144. BearingPoint uses the published business

“Hit” for a parity or benchmark measure to a “Miss,” or vice versa. See Ehr/Fioretti Joint Aff. ¶ 136.

⁴² Illinois Bell (96.0%), Indiana Bell (98.3%), Ohio Bell (97.1%), and Wisconsin Bell (91.2%). See Ehr/Fioretti Joint Aff. ¶ 139.

rules as the primary source of documentation and applies a strict, literal interpretation of the business rules in that evaluation. SBC has provided a detailed analysis of each observation and exception identified by BearingPoint issued under either PMR5-3 or PMR5-4. See id. ¶¶ 145-156 & Attach. F (analyzing each observation and exception listed in the “Comments” column of BearingPoint’s PMR5 Status Summary Charts included as Attachment D).

With respect to the critical performance measurements, in its PMR5 Status Summary Charts, BearingPoint has identified 48 observations and one exception relating to PMR5-3 or PMR5-4. Id. ¶ 145. SBC’s analysis explains that these observations and exceptions generally fall into two categories.

First, they reflect a difference in interpretation of a business rule that may ultimately need to be resolved by the state commissions or through the six-month collaborative review process. Of the 48 observations and one exception under PMR5-3 and PMR5-4, 12 observations relate to business rule interpretations. Of these, eight have already been addressed at the most recent six-month review and four are pending review at the next scheduled collaborative (beginning in August, 2003).⁴³ E&Y identified these same interpretation issues during its audit. Id. ¶ 150.

Second, the observations and exception consist of issues that have already been fixed on a prospective basis but that are not reflected in the July, August, and September 2002 data

⁴³ Observations 628, 659, 711, 719, 722, 727, 731, and 756 have been addressed at the most recent six-month review collaborative. See Ehr/Fioretti Joint Aff. ¶ 150 n.89. Observations 584, 694, 746, (756), and 814 will be addressed at the next six-month review collaborative. Observation 756 has PMs that were addressed in the most recent six-month review but also has PMs that will be addressed in the next six-month review. For analysis purposes, it is considered addressed only in the current six-month review, based on the number of performance measures to be addressed in each. Id. n.90.

months that BearingPoint is reviewing. Id. ¶ 151. For the remaining 36 observations⁴⁴ and one exception⁴⁵ relevant to PMR5-3 and PMR5-4 that cannot be explained by differences in interpretation of the business rules, SBC Midwest has made modifications to either its operational processes or the processing of performance measure data to address the associated issues for all except a single observation.⁴⁶ For 17 of these observations, SBC Midwest restated results because they were either material modifications or because restating results was integral to the BearingPoint test and was required to satisfy test points. Id. & n.96. Nineteen of these observations resulted in changes that were not material, so no restatement was necessary. Id. In each of these cases, minor modifications were made on a going forward basis only. Eight of these 19 observations, together with the one exception, involved process changes that could only be implemented on a prospective basis. Id. The others involved modifications that were not material based on SBC Midwest's restatement guidelines, so the modifications were implemented on a going forward basis only. Id. E&Y has reviewed and verified the corrective actions, and none of these issues materially impact the March – May 2003 data filed with this Joint Application. Id. & n.100.

⁴⁴ Observations 429, 488, 570, 594, 624, 631, 637, 642, 643, 661, 676, 677, 687, 688, 689, 697, 710, 725, 729, 732, 738, 739, 755, 787, 792, 794, 803, 809, 815, 823, 834, 835, 846, 847 and 848 are identified in Attachment F as prospective changes. See Ehr/Fioretti Joint Aff. ¶ 156 n.93.

⁴⁵ Exception 111 includes both interpretations and prospective changes. For purposes here, it is considered in the prospective change category. See Ehr/Fioretti Joint Aff. ¶ 156 n.94.

⁴⁶ BearingPoint's assessment in Observation 854 focused on documentation and SBC Midwest needed only to initiate a documentation update in order to address BearingPoint's concerns. No modification was made to the actual calculation or processing of the performance measure. See Ehr/Fioretti Joint Aff. ¶ 156 n.95.

* * * * *

Individually and together, the E&Y and BearingPoint third party reviews demonstrate that the BOC applicants are generally reporting accurate and reliable performance results on a monthly basis. There is a high degree of correlation between the completed E&Y audit and the completed portions of the BearingPoint metrics review. In conjunction with the other indicia of data reliability discussed below, these third-party verifications provide the Commission a high degree of assurance that the BOC applicants' reported performance data for March, April, and May 2003 accurately reflect its wholesale performance.

B. Other Indicia of Reliability

There can be no doubt that the performance measurements in place in the applicant states today are the result of an open and collaborative process. Over the past several years, this process has allowed all interested parties to participate in the development and modification of existing performance measurements. This collaborative process will continue under the supervision of the state commissions and their staffs to ensure that all necessary modifications continue to be made. See Johnson Aff. ¶¶ 35-39 (Illinois process) (App. A, Tab 29); Butler Aff. ¶¶ 38-44 (Indiana process); McKenzie Aff. ¶¶ 40-41 (Ohio process); VanderSanden ¶¶ 33-40 (Wisconsin process).

Each of the relevant state commissions is committed to the supervision and oversight of the BOC applicants' performance data. They have all committed to overseeing the completion of the BearingPoint PMR tests, and they continue to require refinements to the measurements. The ICC, for example, has required Illinois Bell to make a number of changes and commitments, most of which Illinois Bell has already met, and the ICC will continue to monitor Illinois Bell's compliance with them. See Ehr IL Aff. ¶ 187 & Table 8 (App. A, Tab 18).

Several controls included in the BOC applicants' performance remedy plans and in the state orders ensure the reliability of Ohio Bell's performance measurements data. The BOC applicants are committed to continued compliance with these controls, so that CLECs and regulators can rely on the data to assess their wholesale performance. See Ehr IL Aff. ¶ 188.⁴⁷ The performance results are made available monthly to the CLECs and to the state commission, via the Internet. Proprietary data are password protected, giving each CLEC access to the BOC's performance data for that CLEC, to all CLECs in the aggregate, and to the retail customers of the BOC and the affiliate. Id. ¶ 189.

In addition, the BOC applicants make their underlying raw data available to CLECs upon request and remain ready and willing to participate in data reconciliations with CLECs. Id. ¶ 190. In this regard, each BOC applicant performance plan provides that it and a CLEC "will consult with one another and attempt in good faith to resolve any issues regarding the accuracy or integrity of data collected, generated, and reported pursuant to this document." Id.⁴⁸

The provision of raw data to a CLEC is typically an informal "business-to-business" process that is precipitated by the CLEC's request for raw data for certain months and certain measurements. For example, each of the BOC applicants has been providing raw data pursuant to one CLEC's standing request for several measurements for over a year. Id. ¶ 191.⁴⁹ Beginning in the first quarter of 2003, the BOC applicants began providing CLECs access to raw data for their PM results via the CLEC OnLine Internet web site. Currently, they provide raw

⁴⁷ See also Ehr IN Aff. ¶ 161 (App. A, Tab 19); Ehr OH Aff. ¶ 170 (App. A, Tab 20); Ehr WI Aff. ¶ 165 (App. A, Tab 21).

⁴⁸ See also Ehr IN Aff. ¶ 163; Ehr OH Aff. ¶ 172; Ehr WI Aff. ¶ 167.

⁴⁹ See also Ehr IN Aff. ¶ 164; Ehr OH Aff. ¶ 173; Ehr WI Aff. ¶ 168.